In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE UNITED STATES, APPELLANT,
v.
SIMON NORMILE, JOHN A. FASTABEND, and William P. McGregor, late partners as Normile, Fastabend and McGregor, appellees. } No. 83.

SIMON NORMILE, JOHN A. FASTABEND, and William F. McGregor, late partners as Normile, Fastabend and McGregor, appellants,
v.
THE UNITED STATES, APPELLEE. } No. 84.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from a judgment against the Government in the sum of $4,125.

The alleged claim grew out of a contract for the construction of a lock and dam in the Yamhill River,

a tributary of the Willamette River in Oregon, a keeper's dwelling house and other accessory buildings, and the dredging of a channel at Martins Shoal, some distance below the site of said lock and dam. The specifications notified bidders that the sites had not been purchased and that no work would be commenced until the same were secured. Work was to commence within 10 days after date of notice to the contractors that these sites had been acquired. The whole work was to be completed on or before the 31st day of December, 1898. (Specification 41, Finding II, Rec. p. 9.)

Authority to purchase a definite location was approved March 15, 1898, with instructions that the United States attorney at Portland, Oreg., was to assist in the preparation of final title papers. An abstract of title, together with the deeds, was forwarded to the Chief of Engineers at Washington April 9 and 14, 1898, and request was made for telegraphic approval thereof. April 29, 1898, the Chief of Engineers wired the district engineer at Portland the Attorney General's opinion that the title papers showed incumbrances and unpaid taxes, and requested that the titles be cleared before accepting the deeds. The title papers arrived at Portland on May 3, 1898. On May 13 the United States attorney notified the district engineer at Portland by letter that the titles had been approved by him and the papers transmitted to Washington. The contractors were notified officially of the approval on June 14 following. Not waiting, however, for the official notice, they had begun

work on May 12, one month and two days previous, and when notified, had already completed the dredging, dug a well for the keeper's house, largely completed the dwelling, almost completed the grading for the lock site, finished the framework for the cofferdam around the lock, had assembled a considerable part of the material for temporary sheds, and had sublet the concrete work in the lock wall to contractors who were on the ground preparing to perform their work. (Findings III and IV, pp. 9, 10.)

The work was only partially finished by December 31, 1898, the date fixed for the completion of the contract. The permanent dam had not been begun. In the working season of 1899, the contractors were prepared to proceed with the construction of a temporary dam preliminary to the erection of the permanent dam.

There was no provision in the contract or the plans and specifications for the building of a temporary dam to divert the waters through the finished lock chamber while the permanent dam was being constructed. It was necessary to raise the water 16 feet above the normal elevation for it to flow through the lock chamber, and this required a temporary dam to withstand a 16-foot head of water in addition to the normal flow.

Appellees did not have a civil engineer in their employ, and they asked the Government engineer for advice as to where a temporary dam should be located. Though there was no provision in the contract requiring the Government engineer to tender

such advice, he suggested a site at the head of the lock wall where the river was the narrowest as the most suitable place to construct the dam, and the contractors entered upon their work at this point in June, 1899.

When this temporary dam had reached a height which raised the water to an elevation of 12 feet above its normal stage, or within 4 feet of the elevation necessary to cause it to flow over the lift wall in the lock chamber, the dam broke.

Two other attempts were made to install temporary dams at or near the same location. Before they had succeeded in raising the water as high as they had on the first attempt in each instance the dam broke. The season was then so far advanced that no further effort was made until the working season of 1900, at which time the contractors requested permission to locate a temporary dam farther downstream at a point about 40 feet above the site of the permanent dam, and to cut a hole through the lift wall of the lock chamber. This was granted, and the dam was successfully installed.

The bottom of the river at the place where the temporary dam was finally constructed was of the same character and formation as at the point where the first, second, and third attempts were made, and without the relief afforded by the hole cut through the lift wall of the lock chamber it would not have been possible to construct the temporary dam at the new location. (Finding VII, pp. 12, 13.) The court awarded judgment for the damage caused

by the failure of the second and third temporary dams in the sum of $3,200.

Near the end of the period fixed for the completion of the work request was made for an extension of time, which was granted, upon the express condition that the contractors should bear the expense of inspection and superintendence. Such extension was not necessary because of either freshets, or ice, or other violence of the elements, or delay caused by the United States. The work was not completed until toward the end of the working season of 1900. The United States Engineer Officer, acting within his discretion, charged to the contractors the total expense of superintendence and inspection incurred by the United States during the periods of extension. This amount was $2,196.27. (Finding VIII, pp. 13 and 14.)

The Court of Claims rendered judgment in favor of the contractors for the return of $925 of the amount so withheld on the ground that the delay occasioned by the unsuccessful efforts to construct the second and third temporary dams at the head of the lock wall was not properly chargeable to the contractors; that they should, therefore, be relieved of such portion of the total expense of superintendence and inspection.

The Government maintains that the sites upon which both the successful and unsuccessful temporary dams were constructed were of the same character, the entire bed of the river in this section consisting of shell rock and soapstone. Moreover, without the relieving of the pressure by the hole in

the lift wall the temporary dams must withstand a head of water of 16 feet above its normal flow. Therefore the designation of the place by the engineer officer where the river was narrowest was not negligence, for with all the locations being similar the hole in the lock chamber was the element which made the last temporary dam successful. The first dam would have been successful had the hole been in the lift wall at that time. The government engineer, however, was not called upon either to suggest the location for the temporary dam, or the methods by which the contractors could make it successful, and therefore the Government is not liable for the cost of the unsuccessful dams. If the Government is not liable for loss resulting from the construction of the unsuccessful temporary dams, then it is not liable for delays caused by the breaking of these dams and would not, therefore, be subject to the cost of supervision and inspection during such delays.

ASSIGNMENTS OF ERROR.

The Court of Claims erred:

1. In rendering judgment against the United States on the facts stated in finding VII (Rec. p. 12), for damages resulting from the cost of construction of the second and third temporary dams.

2. In rendering judgment against the United States on the facts stated in findings VII and VIII (Rec. pp. 12 and 13), charging the Government with being liable for inspection and superintendence during time of construction of the second and third temporary dams.

ARGUMENT.

FIRST.

The Government is not Liable for Damages Resulting from the Cost of Construction of the Second and Third Temporary Dams.

The Court of Claims has held the United States liable in the sum of $3,200 for the cost of the second and third unsuccessful temporary dams, on the theory that the Government Engineer failed to exercise ordinary care and diligence in not having selected a new site for the temporary dam after the first one broke. (Op. Rec. pp. 16, 17.)

There is nothing in the findings of fact to warrant the statement in the opinion that the Government engineer "designated" the location of the temporary dam in the sense in which that term seems to be used. Finding VII (Rec. p. 12) shows that the contractors asked the Government engineer where the temporary dam should be located, and in response he "indicated a site near the head of said lock, where the river was narrow, as the only suitable and proper place to construct said temporary dam." This was gratuitous advice, which falls far short of being an order or direction to place the dam at that point, under his authority to superintend and control the work of construction.

The court states that there is some conflict in the testimony as to whether or not the engineer directed the contractors to construct the temporary dam at

the location of the first, second, and third unsuccessful attempts. It says:

> The engineer officer in charge of the work admits suggestions and limited supervision over the site and construction of the cofferdam. The claimant unquestionably acted upon these suggestions as commands (p. 16).

There is nothing in the findings of fact which warrants the conclusion that there was a direction or order by the engineer to locate the temporary dam at the point suggested by him, or that the contractors understood that they were acting under orders.

The opinion also shows a misunderstanding of the situation with respect to the construction of the temporary dam. It says:

> The plans and specifications expressly directed the erection of the cofferdam at a sufficient distance away from the lock as not to endanger the same. (Rec. p. 16.)

The court evidently had in mind the provision of the contract with reference to the location of the cofferdam around the lock wall and lock chamber, a matter which is not in issue here. The specifications forming a part of the contract were not incorporated in the record in this case for the reason that there are only a few sections which have any application to the questions at issue. In order, however, that the court may see the irrelevancy of a reference to a cofferdam around the lock in connection with the construction of the dam, paragraph 70,

which falls under the head of "Lock construction," is herewith set forth:

> 70. *Cofferdam.*—A cofferdam shall be constructed by the contractors around the entire site of the lock and in such manner as to be sufficiently water-tight to prevent objectionable leakage into the lock pit when pumped out. After the completion of the lock, the contractor will be required to remove the cofferdam at his own cost. The time and manner of removal and place of deposit for materials to be prescribed by the engineer.

There was no provision whatever in the specifications with respect to the construction of a temporary dam *across* the stream, and hence no reference to a location for such temporary dam. The contractors having determined upon the building of a temporary dam, the Government engineer derived his authority to see that it was located at a safe distance from the permanent dam from paragraph 46 of the specifications, which contains a provision making the contractors responsible for the protection of "all work" until the completion of the contract. Acting under this general authority, the Government engineer in the exercise of his discretion determined that a distance of 40 feet from the site of the permanent dam was safe, and therefore gave permission in the year 1900 to construct the temporary dam at a new location "about 40 feet from the site of the permanent dam."

Assuming for the sake of argument only that in response to the inquiry made by the contractors as

to the best place to locate the temporary dam the suggestion of the engineer in charge was an "order," nevertheless it is immaterial, for it appears from Findings VII and VIII (Rec. pp. 12, 13) that it was not the change in location which made possible the successful installation of the temporary dam. One location was as good as another so far as the character of the material at the bottom of the river was concerned. The bed of the river in that location was of soapstone formation, and all the temporary dams had to resist the same head of water, hence "it would not have been possible to construct the same [the successful temporary dam] at said point without the relief afforded by the hole cut through the lift wall of the lock chamber" (Finding VII, Rec. p. 13). It is therefore clear that if the selection of the site at the head of the lock wall was a mistake which ordinary care and skill would have avoided, the selection of the site of the successful temporary dam, eliminating the hole in the lift wall, was also a mistake and one for which the contractors are wholly responsible.

The cutting of the hole in the lift wall of the lock chamber made it necessary to raise the water only 4 feet above the normal flow. In the attempt to install the dam at the head of the lock, the contractors succeeded in raising the water 12 feet. Therefore, if the hole had been cut in the lift wall at the time the first temporary dam was constructed, it would have been just as successful as the last one.

Is the Government to be mulcted in damages here because it did not occur to these contractors that cutting a hole would relieve the stress upon the first temporary dam and thus insure the successful installation at the point suggested by the United States engineer? Upon what possible reasoning can it be said that the United States must answer to these contractors for increased expense wholly and entirely due to their own failure to realize the necessity or advisability of cutting the hole in the lift wall of the lock chamber? It was not the business of the Government engineer to devise ways and means of enabling these contractors to construct this work in the most economical and expeditions manner. His sole duty was to see that they carried out the specifications and plans of the contract. (Pine River Logging Co. *v.* United States, 186 U. S. 279.)

It is idle to say that a temporary dam could not be constructed at this point which would withstand the head of 16 feet of water. It might have been rather an expensive operation, but it would have been possible to fill this narrow channel with rock and then face the embankment thus made with concrete or cement. The channel between the lock wall and the opposite bank of the river was not more than 120 feet wide. The installation of a cofferdam which would divert the water usually running through a channel of

this width in a river of this kind at normal flow would have presented no obstacle to the ordinary engineering and contracting concern. However, the court has found, in effect, that it would have been *impossible* to construct a temporary dam across this river without the relief afforded by the hole in the lift wall of the lock chamber. (Finding VII, Rec. pp. 12, 13.) The conclusion is irresistible that the idea of cutting this hole originated with the contractors after two years' experience on the work. The effect and logic of the decision of the court below is to penalize the United States because the contractors did not think of this remedy earlier.

In the final analysis, the conditions being the same where the successful and unsuccessful temporary dams were located, the indubitable inference is that if the hole had been made in the lift wall when the first dam was built the head of water would have been reduced 12 feet, and the dam would consequently have withstood the pressure placed upon it.

SECOND.

The Government is not Chargeable with the Cost of Inspection and Superintendence during the Time of Construction of the Second and Third Temporary Dams.

The second assignment of error must necessarily follow the fate of the first. If the Government is not liable for damages incurred by way of increased cost of constructing the temporary dams, it certainly is not liable for the cost of inspection and superintendence deducted for the period of extension. The

facts stated in Finding VIII (Rec. p. 13) leave no doubt that the deduction was lawfully made. It appears that at the time the request was made for an extension there was no suggestion by the contractors that such extension was necessary by reason of any act or default of the United States, or because of freshets, ice, or other violence of the elements, within the meaning of the contract. They were told at the time the request was made that it would be granted upon condition that the cost of inspection and superintendence should be charged against them, and they made no protest or objection. The same conditions obtained in 1900 when a similar request for extension of time was made and granted.

DELAY IN ACQUIRING TITLE.

It is anticipated that counsel for appellees will assign error alleging that the court should have allowed for the increased cost of materials and labor stated in Finding V (p. 11) on the ground that the same resulted from the delay in notifying the contractors that a clear title to the tracts of land in question had been obtained. It is maintained that under the facts stated in Findings III and IV there was no delay to the contractors because of the apparent delay in notifying them of clear title. They began work May 12, 1898, a month earlier than was anticipated when the specifications were submitted. The specifications quoted in Finding II (p. 9) say:

> Because of the spring rise of the Willamette and consequent overflow of the Yamhill, it is

probable that the actual work on the lock and dam can not be begun by the contractor before June at the earliest.

Finding IV (p. 10) shows that by the first of June, or thereabouts, they had completed the dredging, the framework of the cofferdam around the lock site, and almost completed the grading for the lock site itself. This was all work that would be affected by the "spring rise of the Willamette and consequent overflow of the Yamhill." Moreover, it was all accomplished before the "official" notice that they might proceed with the work had been given. It is safe to conclude they could not have accomplished more if they had received the notice referred to on May 3, the date on which the opinion of the Attorney General to the effect that the sites in question were incumbered, reached the engineer office at Portland.

CONCLUSION.

It is respectfully submitted that the Government is not liable for damages resulting from the cost of construction of the second and third temporary dams, nor for any delay whatsoever for inspection or superintendence during the time of construction.

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Attorney.

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Brief for Normile, Fastabend and McGregor.

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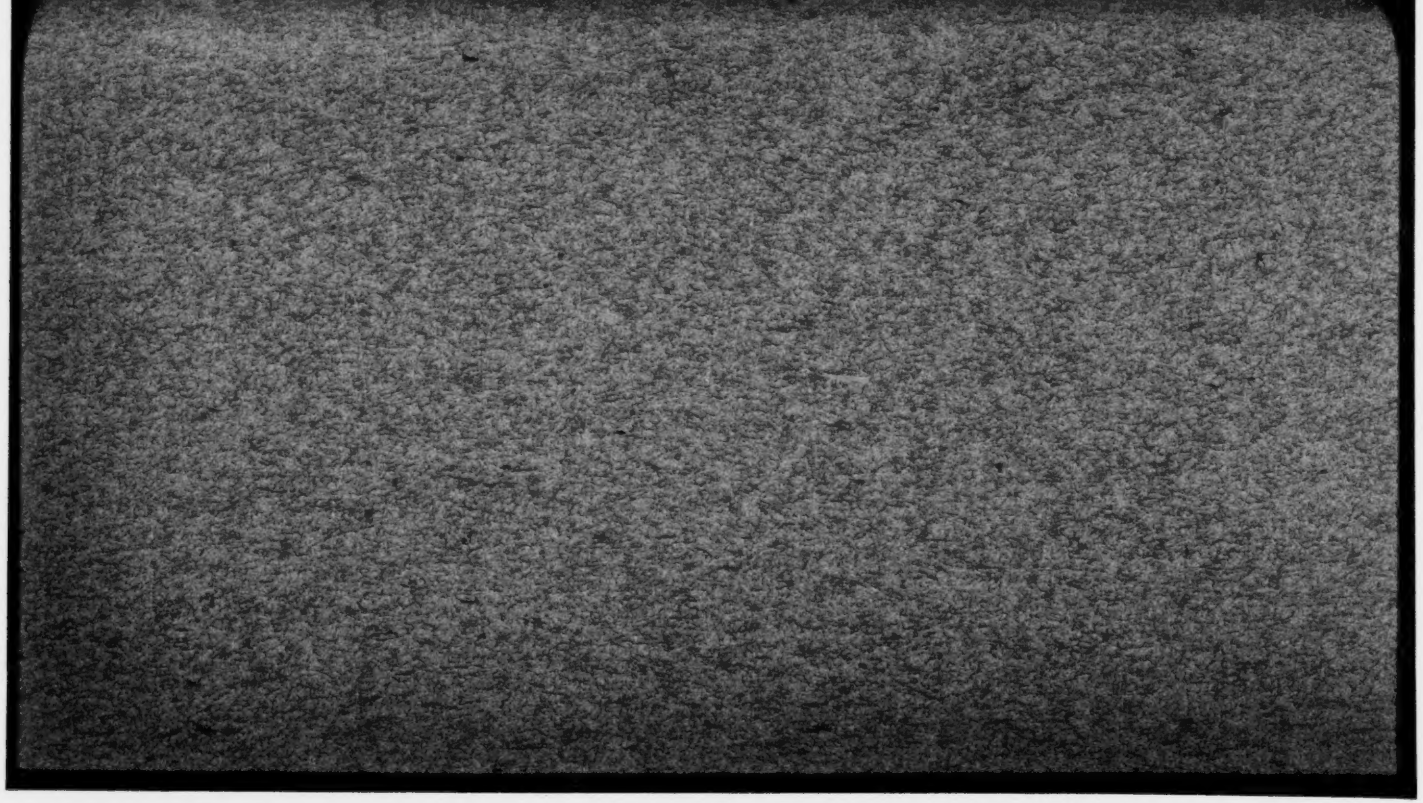

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CASES CITED.

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Brief for Normile, Fastabend and McGregor.

Some substantial amendments are to be made in Government counsels' statement of that part of the case which is the subject of their appeal and brief. In making those, and throughout this, our own brief—since each party is before this court both as appellant and as appellee—we shall retain for Normile, Fastabend and McGregor the designation of "claimants."

(1) At the top of page 2 of the Government's brief it should have been stated that the contract in question was signed by the Government's engineer for that district and these claimants on March 11, 1898, and that on the 24th day of the same month the Chief of Engineers of the army approved it and so put it into effect. From the latter of these dates three months, lacking only 10 days, passed before the District Engineer gave notice to claimants that the Government had obtained the title to the site of the improvement they were to construct, which notice, by the terms of the specifications, was to be their commission for the commencement of operations (Finding II, Record, page 9; finding III, page 10).

(2) In connection with the facts recited in the paragraph commencing on page 2, it is important to say that the general location of this lock and dam had been determined before bids for the work were invited; that bidders were enjoined by the specifications to visit and examine that particular site, and that a purchase of that site had been negotiated and authority from the Chief of Engineers to close the purchase had been requested by the District Engineer (Finding III, pages 9 and 10).

(3) The dredging in advance of official notice to commence, of which the brief speaks at the top of page 3, was done at Martin's Shoal, which was not included in the lock-and-dam site. This shoal was further down the river, and the excavation was purely for the purpose of making a navigable channel in the stream (Petition, paragraph II, page 1, adopted as a part of finding II; finding VI, page 11).

(4) Only at the location first designated and on the original design of the lift wall of the lock chamber (providing no vent for the water) was it necessary to have a temporary dam raising the water 16 feet above normal low-water elevation (Brief, page 3). At the site where claimants were finally permitted to build the

temporary dam, and after a hole had been cut in the lift wall, a raise of four feet above the low-water level was sufficient (Finding VII, pages 12 and 13).

(5) If it is pertinent to say that claimants did not have a civil engineer in their employ (Brief, page 3), it should also be said that they, as well as a superintendent whom they employed part of the time, had had experience in the construction of cofferdams (Finding VII, page 12).

(6) The site for this cofferdam was not "suggested" by the engineer locally in charge. When asked by claimants where this dam "should be located" he "indicated" a site, as the only proper place; and when that site proved impracticable he, upon the application of claimants, named another, nearer the site of the permanent dam (Finding VII, page 12).

(7) Obviously, then, it was not "advice" which the engineer gave to claimants regarding the location of this temporary dam.

If the last observation of counsel on page 3 be construed as meaning that the contract did not require the engineer to name the site for this dam, we can not consent to the conclusion. Paragraph 40 of the specifications (Finding VII, page 11) was as follows:

> "The lines and levels for the work will be established on the ground by the engineers, and the contractor must conform and keep thereto."

(8) "Delay caused by the United States" (first paragraph of page 5 of the brief) is interpolated by counsel into the finding regarding the factors which did not occur, to call for extension of the time for the work. The finding is that the failure to complete the work during 1899 was "not due to freshets, ice or other violence of the elements"—nothing more (Record p. 14).

(9) There was no "discretion" vested in the engineer

within which he acted when charging the claimants the expense of superintendence and inspection borne by the Government during the period of the extension (Brief, page 5, first paragraph). His discretion in this regard was confined by the contract to cases of the contractors' delinquence and to their release notwithstanding (upon terms of their bearing the supplemental charges for superintendence and inspection), from the obligation to do the whole work within the time named. He had no power, when extending the time in the case of delay to the work by the Government itself, to put a price on the extension and so to make that serve in lieu of money damages which might be due the contractors from the Government. This latter, however, he did not attempt. He did not grant these extensions "upon the express condition that the contractors should bear the expense of inspection and superintendence." He merely advised them (properly enough) that such extensions would not absolve them from any obligation the contract itself imposed upon them regarding these particular expenses (Finding VIII, page 13). But with respect to delay caused by the Government the contract did not put any such expenses on the contractors.

FACTS OF THE CROSS-APPEAL.

The following facts are the main subject of claimants' appeal.

During the procrastination of the Government officers in the handling of the title papers and notification of claimants to proceed with the work, the war with Spain intervened and thereupon prices of the materials for the work and the necessary labor increased a total of $9,531.88. This, the court finds, was the "increased cost," to claimants (Finding V, page 11). Providentially this increase was less than it would have been had claim-

ants stood squarely on their contract rights. In anticipation of formal authorization of the work (to follow on approval and passing of the title) they went to work on those preliminary parts of the project which did not require any large outlay or obligation for materials. Before receiving the formal notice to proceed they had commenced to build a dwelling house for the lock-keeper and were making preparations for excavating the lock pit.

The cross-appeal also seeks full compensation to claimants for the three unsuccessful attempts to construct the temporary dam protecting the site of the permanent dam; only two of those being included in the judgment.

ASSIGNMENT OF ERRORS.

Claimants say the court erred:

(1). In dismissing the petition as regards the increased expense suffered by claimants, in performance of the contract work, by reason of the delay of the United States in obtaining title to the site of the improvement and in giving notice to claimants that the title had been approved and accepted.

(2). In not rendering judgment in claimants' favor for the amount of the increased expense suffered by them, in performance of the contract work, by reason of the delay of the United States in obtaining title to the site of the improvement and in giving notice to claimants that the title had been approved and accepted.

(3). In not giving claimants judgment for the expense suffered by them, viz., $4,800, in three unsuccessful attempts to construct the temporary dam, protecting the site of the permanent dam, rather than for $3,200, the expense of two alone among such three attempts.

LAW POINTS AND AUTHORITIES OF CROSS-APPEAL.

In determining the rights of parties under a contract a court will give great deference to the practical interpretation which has been put on it, in the course of its performance, by the parties themselves.

District of Columbia v. *Gallaher*, 124 U. S., 505.
Insurance Co. v. *Dutcher*, 95 U. S., 269.
Old Colony Trust Co. v. *Omaha*, 200 U. S., 100.
Simpson v. *United States*, 172 U. S., 372 (382).
Topliff v. *Topliff*, 122 U. S., 121.
Fitzgerald v. *First National Bank*, 114 Fed. Rep., 474.

The United States in letting a construction contract warrants the adequacy of the plan and the competence and diligence of its agents in the performance of all duties imposed on them by the contract.

Simpson v. *United States*, 172 U. S., 372.
Christie v. *United States*, 237 U. S., 234.
United States v. *Gibbons*, 109 U. S., 200.
J. Hampton Moore, Receiver, v. *United States*, 46 Ct. Cls., 139.
Spearin v. *United States Court of Claims* (not reported).
Wyandotte Railway Co. v. *King Bridge Co.*, 100 Fed. Rep., 196.

One party to a contract, having prevented performance by the other within the stipulated time, is not relieved from liability by anything done in the enforcement or discharge of provisions in the contract, or of other agreements supplemental thereto, by which liquidated

damages were to be paid by such other party in the event of delay chargeable to him or purely accidental.

Maryland Steel Co. v. *United States*, 235 U. S., 451.

United States v. *United Engineering Co.*, 234 U. S., 236.

One party, who has prevented the performance of a contract can not be heard to say, in defense of a claim against him for damages, that the other party should have gone on and done those things, useless in the situation which actually arose, that would have been required for performance of the contract on his part.

Hinckley v. *Pittsburgh Steel Co.*, 121 U. S., 264.

When one party to a contract has prevented performance thereof in accordance with its terms, and plans made by the other party for obtaining his materials have been upset thereby, the innocent party is not bound, upon the termination of the delay, to buy forthwith the entire supply of materials which will be required—and least of all where, by reason of the delay, conditions have so changed that the materials can not be used as rapidly as was intended by the contract.

Kelly & Kelly v. *United States*, 31 Ct. Cls., 361.

ARGUMENT.

With respect to the first ground of their appeal, having to do with the temporary dam required for protection of the site of the permanent dam, counsel for the Government contend (1) that it was not a function of the Government engineer, under the contract, to fix the location of that temporary structure and (2) that the successive sites were not in fact designated, but were

merely suggested, by him. We take issue with counsel on both of these propositions.

Authorities will not be needed for the proposition that under all contracts with the United States for public improvements the work, in all its details, in the absence of reservation in the contracts, is subject to supervision and control by the agent of the Government who has charge of the project. Usually, for convenience and clarity some provision to this effect is made in the specifications; but the contract would be read as containing such provision if it were not expressed. The point is succinctly covered in paragraph 40 of the specifications in this case, as follows:

> "The lines and levels for the work will be established on the ground by the engineers, and the contractor must conform and keep thereto."

We submit that the parties in this case acted in strict compliance with the terms of the contract. The contractors promptly called upon the engineer to designate a site for the dam in question, and he not merely did designate a site but said that none other would be suitable. The contractors attempted faithfully to comply with the engineer's plan of work; three dams being successively constructed by them at this site almost to the level required, but all finally giving away to the pressure of the water. The engineer then granted their request for a change of site and permitted them to build this dam forty feet nearer to the site of the cofferdam.

This particular dam was a necessary incident of the work of the construction for which the contract provided. It was, then, as clearly and as necessarily within the control of the engineer as was, say, the buttressing of the permanent dam itself at its ends. This latter was not mentioned in the specifications, but it was inseparable from the placing of the iron work and concrete

which were among the specified units of the work, and therefore it was subject to supervision, direction and approval of the engineer. The temporary dam likewise being necessary, every detail of it which might seem to the engineer to have any importance, including its location, was to be determined by him. His judgment at first was that to have it constructed within forty feet of the site of the permanent dam might in some way endanger the latter or interfere with its construction. Under the contractors' protest, and their suggestion of a change in the plan of the head wall of the lock, he finally decided and ruled that there would be no serious jeopardy to the permanent work if the temporary dam should be only forty feet away.

The Parties' Interpretation.

Even though there be room for dispute regarding the interpretation of the above paragraph of the specifications on its face, there can be no doubt regarding the parties' understanding of it. When the occasion arose to locate this temporary dam both the contractors and the engineer acted on the idea that this question was for his decision, and they so acted to the end, when their appeal for change of the site was granted.

In *District of Columbia* v. *Gallaher*, 124 U. S., 505, this court has said:

> "When, in the performance of a written contract, both parties put a practical construction upon it which is at variance with its literal meaning, that construction will prevail over the language of the contract."

For claimants' purposes in the present case it is sufficient to say that, if there be an *ambiguity* in the paragraph above quoted, the guide for the solving of that is the "practical construction" put upon it by the parties.

A very concise and clear statement of the rule of law which we here invoke, with its reasons, is found in *Insurance Company* v. *Dutcher, 95 U. S., 269.*

> "The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant, than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former. In considering the question before us, it is difficult to resist the cogency of this uniform practice during the period mentioned, as a factor in the case" (Page 273).

Other cases illustrating this rule of the law are:

Old Colony Trust Co. v. Omaha, 200 U. S., 100.
Simpson v. United States, 172 U. S., 372 (382).
Topliff v. Topliff, 122 U. S., 121.
Fitzgerald v. First National Bank, 114 Fed. Rep., 474.

The Government is Responsible for Its Plan of Work As a Whole.

The Court of Claims finds that the bottom of the river at the original site for this temporary dam and at the down-stream site, where it was finally constructed, was of the same character, and that even at this latter site it would not have been possible to build the dam without the relief afforded by the hole cut through the lift wall of the lock chamber on leave granted by the engineer when he made the new location; and counsel for the Government argue that the fault was with the plan of this lift wall, not with the site first designated for the temporary dam. We submit that the design for the work

and the location of this temporary dam must be construed in the light of the relation of the one to the other; that a plan of work unsuited to the locus could not be a good plan, and that a site unsuited to the plan could not be a good site. If this is true, the real inquiry here is whether the first (upstream) site was a proper place for a dam if the dam was not to have the aid of a vent hole in the lift wall of the lock; and we say the Government is answerable to these claimants because the location, bad by this test, was dictated to the claimants and that, at least after the first attempt, the engineer knew, or was charged to know, that this was not a proper site.

In dealing with this question the Court of Claims had for a guide, its own decision, somewhat recent, in *J. Hampton Moore, Receiver's* case, 46 Ct. Cls., 139. There was in that case a question of cofferdam construction, and in the essentials the case was parallel with that here presented. The subject of the contract was the building of a dry dock; and the contract contained the provision that the contractors should "at their own risk and experience furnish and provide . . . temporary structures of every description . . . necessary or requisite in and about the construction of said dry dock . . . subject to the approval of the engineer." One of the temporary structures necessary (not named in the contract or specifications) was a cofferdam, and the Government's engineer worked out a plan for that dam. Built twice upon this plan, however, the dam twice failed. Judgment was given in the claimant's favor for the cost of these two inadequate structures. The court said:

> "We believe the rule in cases of this character to be that where a contractor constructs a work under a contract which provides that it shall be done under the direction and supervision of an engineer appointed by and under the employ of

> the owner and loss occurs to such contractor by reason of defects in the plans directed to be followed by such engineer, of a character which ordinary skill would have foreseen, the owner should pay for such loss'' (Page 174).

The Court of Claims had found in that case that the Government officer in charge, although reasonably skilled as a civil engineer, had had but little experience in the construction of cofferdams. The contractors, having ample experience and better engineering advice, objected to the engineer's plan but took no appeal and followed the engineer's directions without protest. The decision for the claimants is on the ground that the defects of the cofferdam plan could have been foreseen by an engineer of proper experience, and that the Government was negligent in giving authority to a less competent person.

Wyandotte Railway Co. v. *King Bridge Co.*, 100 Fed. Rep., 196, was decided by the Circuit Court of Appeals for the Sixth Circuit. The bridge company was to construct an inter-county bridge under a contract denying it compensation for any extra labor or material not agreed to in writing. The engineer of the other party made a mistake in locating the abutments for the bridge ends and this caused the bridge company additional expense in material and in labor. It was held that he was entitled to compensation for that.

When the Boston dry dock (J. Hampton Moore, Receiver) case was decided by the Court of Claims, the decision and opinion in *Simpson & Co.'s* case, 172 U. S., 372, had been considered by that court time and time again. Simpson & Co.'s contract was for the construction of a dry dock at any available site, within the limits of the Brooklyn navy yard, which should be designated by the Government's engineer. Nothing was said in the contract or specifications regarding the character

of the soil to be excavated. Borings had been made by which to test the soil under these yards, and this fact was known to these contractors when they made their bid. In the excavating, a stratum of quick sand, not disclosed by those borings, was encountered and this added largely to the cost of the work. This court, taking note of the fact that the contractors had had ample experience in such work, observed (page 381) that if it had not been their intention to construct a dock except upon a guarantee by the United States regarding the character of the material to be excavated, "a purpose so important, so vital, would necessarily have found definite and positive expressions in the bid and specifications." The judgment of the Court of Claims, dismissing the petition, was affirmed.

In the case here presented the Government, by reason of its control of the details of the construction, warranted to the contractors the exercise of skill and diligence in the decisions to be made on all such points. It is obvious that its local engineer, by whom the location of the temporary dam was decided, either lacked skill or was of such head-strong temper as not to yield where he knew he was wrong.

The Court of Claims, quite properly, has not been concerned to find what claimants did, before and during the three attempts to construct the temporary dam at the first site named to them, toward obtaining a different location. It is nothing to the point whether they offered or did not offer resistance or objection to the engineer's choice of a site, seeing that the contract did not give them any voice in the selection. In other words, their rights here would not be affected if it were conceded that they proceeded throughout to comply with the engineer's directions without making any protest. That was what the contractors did in the Boston dry dock case.

If Simpson & Co. had really relied upon what was indicated by the Government's drawings, this court undoubtedly would have held that they were entitled to relief against the increased expense to which they were subjected. To that effect is *Christie* v. *United States*, 237 U. S., 234, the most recent case in point. There the representation made by the specifications with some borings were held to amount to a warranty that the subsoil was mainly gravel, sand and clay, and it turned out that the material was really of a nature much more difficult and expensive to penetrate and remove. The court said:

> "There was a deceptive representation of the material, and it misled. In opposition to the seemingly irresistible conclusion that claimants were justified in their reliance upon the drawings, it is contended that the river was alluvial and its character warned claimants of the possible conditions which existed and that besides the court found 'they admitted they had reason to, and did expect to, encounter some logs.' . . . It makes no difference to the legal aspects of the case that the omissions from the records of the results of the borings did not have sinister purpose. There were representations made which were relied upon by claimants, and properly relied upon by them, as they were positive." (Pages 241 and 242) . . . Besides it was admitted in the argument that time did not permit borings to be made by claimants (Page 242).

In Simpson & Co.'s case this court put stress upon the mental attitude held by the contractors when they were preparing their bid, upon their conscious assumption of all risks regarding the soil. It is pointed out that they relied upon their experience and skill to make their bid sufficient in amount to cover all contingencies in this regard. Besides, on the theory of *expressio unius, exclusio alterius*, reference is made by the court (page 382)

to provisions of the specifications defining the rights of the parties in the event of a greater depth of piling for the foundation being made necessary by reason of a less stable subsoil than was expected.

Normile, Fastabend & McGregor made no examination of the river bottom, when preparing their bid, and it would have availed them nothing if they had. In any event they were to build, or to attempt to build their temporary dam at a place which should be selected by the Government's engineer as suited to the plan for the permanent work, including the lift wall of the lock, and there was no flexibility of the plan to meet contingencies of the material in which the contractors would have to work. The Government, in other words, assumed all responsibility for all details of the project and for the methods to be employed in the construction.

It will be observed that these claimants had not contracted for any lump sum to build a lock nor a dam nor anything else. Those designations of the work were used merely for convenience in the opening paragraph of the contract. The real undertaking is stated in the next following paragraph, printed at the top of page 2 of the record, and in the specifications which referred thereto. It was to place, at unit prices stated, certain defined shapes of iron work or lumber and certain concrete of defined composition, in such ways as to form *inter alia* a dam. In everything relating to the placing of these materials, including the methods thereof (as well as to the qualities of the materials) the work was to be governed by the Government's engineer.

The obvious fact is that the Government's engineer under-estimated the water pressure which would be encountered by a temporary dam at the narrow, and, therefore, deep part of the channel which he first selected as its site; and that even at the less water pressure to be overcome where the dam was finally built—the stream

being wider there and not so deep—the plan was unworkable until a vent for a part of the water was made in the lift wall of the lock.

The Government, in the Boston dry dock case, submitted to a substantial judgment rendered against it on the point we have here discussed; so the case never came to this court for review. The decision, however, has been followed by the Court of Claims, Chief Justice Campbell alone dissenting, in *Spearin's case* (No. 30509 in that court), not yet officially reported. That also was a dry dock case. The plans of the work showed two sewers, constructed some years before, as protecting the site of the excavation. It appeared that before the contract was let these sewers had often overflowed, that this fact was known to the Government's officer in charge, but that it was unknown to the contractor and that he had not made any inquiry on the subject. While the work was in progress there was a rain storm, but not of any unusual violence for the season—not to be classed as the act of God. This did such damage that the contractor refused to proceed and the Secretary of the Navy "annulled" his contract. The Court of Claims in its opinion (page 10), says:

> "The contractor is obliged to do what the plans and specifications direct him to do, and when he has done so in a good and workmanlike manner, he has discharged his reponsibility under the contract. If the plans and specifications are deficient, if they are inadequate and structurally wrong, it is the fault of the parties proposing them and not the contractor executing the same. The judgment and skill of the contractor is relied upon by the defendants to the extent only of executing the plans as they design them. Neither the contractor's previous experience nor his general knowledge with reference to the character of the work is sought by the defendants in laying out the scope or detail of the same."

Spearin himself had rebuilt one of the sewers on a plan and of dimensions specified in the contract and on lines laid by the Government's engineer. In doing that it had been necessary to remove a number of buildings and some other obstructions. In this connection the Court of Claims says:

> "All these interferences suggested, of course, difficulties in the skill and workmanship required to remove them and the cost thereof, but nothing as to the inherent structural weakness of a sewer the defendants would only allow him to remove and construct in a fixed and certain way" (Page 14).

These observations of the Court of Claims find full authority in *United States* v. *Gibbons*, 109 U. S., 200. That case was concerned with house construction. A building in the Norfolk Navy Yard had been burned, and the Navy Department, in its reconstruction, planned to save the foundation and so much of the lower part of the walls as was supposed not to have been impaired by the fire. The claimant took a contract to build up the walls from the points indicated, first removing the damaged parts. It turned out that the standing walls were not good so high as had been supposed; and the suit was brought by the contractors in the Court of Claims to recover additional expense suffered by them in removing the walls to lower lines before superimposing that construction which they had undertaken by the contract. This court, affirming the Court of Claims, said (pages 204 and 205):

> "It was the duty of the United States to point out the work deemed to be sufficiently uninjured to remain, and this was performed by allowing it to stand, and by not directing it to be taken down. . . . The foundation and walls themselves, as left standing by authority of the proper

> officers, constituted, under the circumstances, a representation on the part of the United States that they had been adjudged to be so far uninjured by fire that they were to remain, upon the faith of which the intending contractor was entitled to rely for the purpose of estimating the probable cost of the work to be done."

We suppose the court will not consider very seriously the suggestion of opposing counsel that Normile, Fastabend & McGregor, at any time, without leave of the engineer, might have cut through the lift wall of the lock the culvert which turned out to be necessary for relief of the temporary dam. This lift wall was a part of the permanent structure. It had been, or would have to be, approved and accepted by the engineer. It is not to be imagined that the engineer would have given permission for any such opening to be made in the wall without assuring himself that this would be closed again and that thereupon the wall would be the same, in compactness and strength, that it was before; so important was this wall in the general plan. Can counsel believe that (no permission to cut into that wall having been sought by the contractors) the engineer, taking a morning promenade along the lock site and observing that a culvert had been cut through the wall, would have said that he was helpless, that the contractors were within their rights and had had no reason to consult him? To us this is unthinkable.

If this court, taking that view of the law which the court of Claims took in the Boston dry dock case and in the Spearin case, should hold the Government liable for the defects of the plan or for the incompetence of its engineer having charge of the construction, compensation will be due to claimants for all of their three attempts to construct this dam at the site first named. If it be held that there was no negligence until this first site had

been once tested, then the judgment should stand as it is, compensating claimants for those two attempts alone which followed the original failure at this site.

Administrative Expense Imposed on the Contractors.

In view of the delays to which claimants were subjected the engineer twice extended the time for the completion of the work, but in his settlements with claimants he charged them with $2,196.27, the amount of the expenses borne by the Government in superintending and inspecting the work during the periods of the extension. The judgment awards to the claimants, out of this amount, so much as accrued during the second and third attempts to construct the temporary dam above the site of the permanent dam, viz., $925.

We agree to the proposition of Government counsel (page 12) that claimants' right to be reimbursed this expense depends upon the liability of the Government for the delay in question. Then, of course, we do not agree to the assumption (page 13) that the extensions, by their own terms, put these expenses upon the contractors.

The contract, we repeat, did not give the engineer any power over the expenses of this character in the event of an extension from a cause for which neither party was answerable, to wit., violence of the elements (Record pages 2, 3 and 13); and it is clear enough that the parties did not regard these agreed extensions as within any provisions of the contract. The Court of Claims points out that claimants, when seeking the extensions, did not put their application on the ground of interference by the elements; but the engineer, in granting the extensions, did not stipulate for the imposition on claimants of the expense to which the contract referred. What the engineer did say to claimants was that the allowance of the extensions would not "absolve" them from any obliga-

tions they were under by the contract for the expenses of superintendence and inspection (Finding VIII, page 13). This was true enough, for these extensions had no relevancy whatever to any expenses named in the contract. He was not absolving the contractors from expenses they were to suffer, by the contract, from the fault of the Government, because there was nothing in the contract relative to expenses so originated.

The contract provided that an extension on account of interference by the elements should not "affect the rights or obligations of the parties under this contract"—that those rights should be precisely the same as if the work had been completed at the date originally fixed. It will not be contended, we assume, that in the case of an extension occasioned by the Government's fault the engineer had power over the contract which he did not have in the case of an extension providentially occasioned without fault of the Government. His communication, then, is not to be interpreted as stipulating that the contractors should suffer, in expenses, for the Government's fault.

We submit that the engineer's action upon these requests of the contractors had no effect whatever except to grant the requests and enlarge the time for the performance of the work. This being true, we have practically the same case that was before this court in *Maryland Steel Co.* v. *United States*, 235 U. S., 451. The contract there in question gave the Government's agent, the Quartermaster-General, no authority to extend the time for performance. But he did extend the time. It did not appear that the Government had suffered any damages from the delay. This court, approving the decision in that particular of the Court of Claims, held that the Quartermaster-General, having general discretion in the premises and having accepted "delivery" within the time of the extension, his stipulation in that

regard was valid and operative—in other words, that the contract had been modified and there was no breach by the contractors. The Court of Claims had allowed a counterclaim of the Government for the amount of damages, liquidated in the contract, which had accrued during the extension; and for that the case was reversed.

Quite clear also, in favor of the present claimants, is *United States* v. *United Engineering Co.*, 234 U. S., 236, the Government being held liable for the consequence of delay caused by itself notwithstanding a provision in the contract for liquidated damages to be paid by the contractor, for his tardiness of performance, and his actual failure to proceed diligently after the Government's engineer, by reason of the Government's fault, had extended his time.

Increased Cost of Work From Government's Tardiness.

Much the most serious ground of complaint on claimants' part was the Government's unexcused delay in authorizing the construction of the lock and dam. On this point the facts in detail are as follows:

The advertisements and specifications, the material portions of which are set out in the findings, were issued on January 3, 1898. The general location of the lock and dam had been previously determined, negotiations for the purchase of the land, in three parcels, having been in progress more than six months and brought to a definite conclusion. A tentative location of the lock and dam on this land was exhibited at the office of the district engineer in Portland to respective bidders. Claimants, under the injunction that the work was to be pushed so as to complete it during that one working season, made their estimate based on the prices for which the materials could then be obtained. Their bid, of course, was the lowest submitted. The contract

was signed by the engineer and claimants on March 11, 1898. One day earlier the District Engineer had repeated a request which he had addressed to the Chief of Engineers for authority to conclude the purchase of the site. The Chief of Engineers gave this authority by a telegram sent on March 15th; and on March 24th he formally approved the contract. On April 6th, claimants, by letter reminded the engineer of the importance of commencing operations and in reply were advised that the title papers, approved for recording, were expected to arrive the latter part of the following week, and that in that event the work should proceed as described by paragraph 41 of the specifications. The text of that paragraph follows:

> "The sites for the lock, dam, and keeper's dwelling have not as yet been purchased by the United States, and no work will be commenced under this contract until the same are secured. Within ten days after the date of notification to the successful bidder that the above sites have been secured and the contract covered by these specifications has been approved, he must proceed with the work in a vigorous manner; he must complete the keeper's dwelling, woodshed, walks, fences, etc., within sixty days from date of notification, and the whole contract on or before December 31, 1898" (Finding II, Record p. 9).

The formal notification to claimants, required by the contract of the Government's acquisition of title was not given them until June 14, 1898.

To sum up:

From the time of the submission of claimant's bid to the day of the authorization of the work some five months elapsed.

Between the signing of the contract and this authorization of work three months elapsed plus about days.

Between the approval of the site-purchase by the Chief of

Engineers and this authorization of the work there elapsed three months and three days a thing one day.

Between the advice, received by the engineer, of the approval by the United States District Attorney of the title to the land and this formal authorization of the work thirty-two days elapsed.

(Findings II and III, Rec., pp 9 and 10; Opinion pp. 14 and 15.)

Referring to these lost three months, the Court of Claims says in its opinion:

> "The last month of this period, under this record, is clearly chargeable to the defendant's neglect, and if shown to have been the proximate cause of the subsequent loss, would entitle the claimants to a judgment therefor."

Judgment in this particular was denied because, disregarding the terms of the contract regarding the commencement of the work, claimants had during May gone ahead and commenced the construction of the dwelling for the lock-keeper and made some preparations for the excavation of the lock chamber—probably also clearing away brush from the sites of other parts of the work.

The findings set out the commencement of the war with Spain on April 21, 1898, and say that thereupon the prices of the materials and labor needed in the construction of the lock and dam advanced. Then this follows:

> "The increased cost to claimants of materials used in the construction work under said contract caused by said war was $5,389.08, and the increased cost of labor employed in the completion of the work was $4,142.80" (Finding V, page 11).

This latter seems to make it clear that the retarded commencement of the work on the main project *was*

the "proximate cause" of the excessive expense borne by claimants. The true meaning of the opinion, then, is that claimants should have made their purchases of materials, and contracted for their labor, before getting authority to use either, and so have avoided the risk of advances in prices—in other words, that with respect to these expensive materials they should have taken the same chance that they did take on the few thousands of feet of lumber and the few kegs of nails, etc., which were used in the part construction, in advance of authority, of the keeper's house, etc.; or conversely, that they should have forborne this enterprise regarding the dwelling house, etc., and so have permitted a larger claim for damages to accrue.

Curiously enough, however, finding V concludes with this statement:

> "Claimants did not have sufficient storage room and other facilities for storing large consignments of materials."

The significance of this would seem to be that, if claimants had bought the materials in time for the anticipated use, they might have been destroyed for lack of shelter.

Read together, the findings and opinion seem to mean (1) that, with no assured opportunity to use these large quantities of materials, claimants ought nevertheless to have bought them and (2) that if the right to use the materials had been assured and claimants then had bought them, they probably would have been destroyed by the elements before the opportunity for their use actually occurred. The latter of these propositions, if relied on as acquitting the Government for the results of its breach of its contract, has no support, we venture to say, in any judicial opinion or text-book ever printed.

Will it be said that the purpose of this sentence in the

findings is to intimate that claimants, if seasonably authorized to proceed with the construction of the lock and dam (under admonition that the work must be done speedily) would not actually have gone into the market and bought their supplies? This idea can not be entertained because it is in conflict with the preceding, explicit statement in the same finding that the (actual) cost to claimants of their materials and labor was (actually) increased by this delay the amount stated.

Respect for the Court of Claims forbids the assumption that the purpose of this statement regarding lack of storage facilities is to suggest a doubt whether claimants, upon due notification for the work, would actually have bought or contracted for their supplies. If this latter were proved to be true, it, obviously, would be irrelevant; but if it were relevant a finding, positive or negative, should have been made on the precise point, viz: Did claimants upon the submission of their bid, or upon the approval of their contract by the Chief of Engineers, go into the market and place orders or take bids upon these materials, to be furnished at their call, all conditioned on the expected early authorization of the work.

We say that in our view of the law this latter inquiry could have no materiality. If, however, we are mistaken and this point is material, the Court of Claims, we submit, should be directed to make definite findings upon it, the case being remanded for the purpose.

If mere speculation is to be indulged, on the record actually before this court, it would be difficult to believe that claimants, if there had been no delay on the Government's part, would not have availed of the prices which ruled before the war with Spain began. They had taken at their full face value the notice given by the Government, when inviting bids, that the work was to

be done at high speed in order to be completed in the one season. Before their contract was signed and approved, valuable time had already been lost, about a month of it. This alone may not have given them any legal ground of complaint against the Government, but it gave a new urgency to the call for rapid action. Thereafter it was all the more probable that they would at the outset make provision for their materials. That, during the period of stable prices they had not abandoned the hope of doing the work in that year is clear. Even on April 6th they wrote to the engineer seeking authority to proceed on the whole project and not suggesting that an extension of time would be necessary. The one reasonable assumption is that they intended, immediately upon authorization of the lock-and-dam construction, to lay in their materials or to go into contracts which would insure that supplies would come to them steadily from the warehouses of the big merchants.

Of claimants' actual deferring purchase of the main materials, while going ahead on preliminary work, a sufficient explanation is found in paragraph 41 of the specifications in page *supra*. While the whole of that calendar year was allowed for the work as a whole, it was stipulated that the keeper's dwelling, woodshed, etc., were to be completed within sixty days from notification regarding the title. Claimants, of course, took some risk when they commenced their work on the keeper's dwelling and the other preliminary parts of the project, but that was no more than was dictated by good business judgment, in view of the short time allowed for those particular operations. There is nothing to suggest a doubt that if, during the comparatively small delay attending the approval of their contract, they had been notified promptly that the title had passed to the Government, they would have exercised the same

sound judgment and made provision for all their materials. In other words, claimants acted with prudence in regard to the work they would have to do in sixty days, and it should be assumed that they would have acted with prudence in regard to the other work which then was to be done in some four months instead of the six months which had been promised by the advertisement and specifications.

We, however, do not understand the law to be that one who by dilatoriness or by positive action has broken his contract may go free of damages if he have the ingenuity to suggest how the other party, in the event of full performance, might possibly have done something or been guilty of some omission which would have made the contract of no value. The rule that we learn from the authorities is that the contract-breaker must compensate the other for his lost opportunity to make a profit and will not be indulged to invent theories upon which his own wrong-doing might not have had effected the injury that in the usual course would naturally have ensued.

The law applying to such a situation was declared by this court in *Hinckley* v. *Pittsburgh Steel Co.*, 121 U. S., 264, originating in a refusal of one party to take within the time stipulated 6,000 tons of steel rails for which he had bargained with the other and the subsequent sale to a stranger of 4,000 tons alone which had been manufactured for that contract. We quote (page 274):

> "The proposition that, after the defendant had, for his own purposes, induced the plaintiff to delay the execution of the contract until after the 31st of August, 1882, and had thereafter refused to take any rails under the contract, the plaintiff should still have gone on and made the 6,000 tons of rails and sold them in the market for the defendant's account, in order to determine the

amount of its recovery against the defendant, can find no countenance from a court of justice.

. . .

"It is also to be inferred, from the price at which the 4,000 tons of rails were sold by the plaintiff, that the market price of rails declined below the price named in the contract, and the reason assigned by the defendant, in September, 1882, for not taking any rails under the contract, was that he had made arrangements to purchase rails of others at a lower price. Under these circumstances, the defendant is estopped from insisting the plaintiff should have undertaken the risk and expense of actually making and selling the rails.

The court then referred to the rule declared in *Philadelphia, Wilmington & Baltimore R. R. Co.* v. *Howard*, 13 Howard, 307, to the effect that "profit" (as there defined) is always recoverable by one who is prevented from performing his contract according to its terms, provided its loss followed directly from the breach and there is a definite measure of it, such as market prices.

On the question with which we are here dealing, again, the Court of Claims had in one of its former decisions a rule of law by which to decide this case. In *Kelly & Kelly* v. *The United States*, 31 Ct. Cls., 361, the measure of damages for delay to which contractors had been subjected, in the construction of a Government building, was to be determined. There, as here, the Government was first to procure the site of the work and had been negligent in so doing. The contractors were not in position to take, in advance of need, materials (stone) for which they had contracted and so had to surrender contracts that they held with quarrymen. In the Court of Claims, they recovered judgment for the cost suffered by them, in their later purchases, above what they would

have paid under those arrangements. Referring to a suggestion that in such a situation subcontracts should be placed for all the necessary materials as soon as authority is given to proceed with the contract work, the court said:

> "A contractor failing to do so would not thereby be estopped from recovering damages for the enhanced value of materials growing out of the defendant's delay."

The net result of the authorities then seems to be (1) that Normile, Fastabend, and McGregor, in order to have a valid claim against the Government, with respect to its default in the starting of the work, did not need to go into the market and buy materials and then forthwith sell them for account of the Government, and (2) that, actually buying at the later times when the materials were needed—then in smaller quantities because the opportunity to do the work in one season had passed—are entitled to maintain a claim on the basis of the market prices at which they could have bought at a time which the Government was bound to give them as the starting point of the contract project.

No Case For Estoppel of Claimants.

When the Court of Claims has said that the Government does not appear to be "responsible" for the increased cost of claimant's work caused by the delay (finding V) it has, properly speaking, stated a mere conclusion of law. To give the statement place in a finding of fact, it must be interpreted as an epitome of the court's recitals in the opinion regarding the early commencement of work, without authorization, on the preliminaries of the project; for the opinion in effect says that, having done this little work prematurely, claimants had no right to indulge any doubt, during the weeks

following, of the early action on the part of the Government's officers, in the Department of Justice and War Department, by which they should be put to work on the main structures, and, therefore, are themselves responsible for the increased expense which they actually suffered from their forebearance to buy or contract for the materials to be used in that major construction. In other words, the court penalizes the contractors for their efforts to repair, as far as possible, the Government's dereliction and to reduce to a minimum the injury to themselves. We believe counsel will not question the proposition of law that one who is injured by a breach of contract *must* make every reasonable exertion that the injury may be as small as possible. On our part, it will not be disputed that in some circumstances premature action by one party to a contract may release the other party from any claim regarding failure of prompt performance on his part. This latter, however, can occur only by way of estoppel of him who would allege the breach of the contract; and the conditions of such an estoppel are clearly defined by the law. We submit that they are lacking in this case.

Firstly, being now held answerable for the delay in putting claimants to work on the main construction, the Government can not have suffered any *loss* from that delay by anything that has intervened to this time. Secondly, whatever be the consequences of the course pursued by the parties, no change of their relative rights under the contract could occur unless there had been acquiescence in that change by the party (claimants) now complaining; and in fact, so far from acquiescing, claimants were insistent in asking better diligence from the Government to the end that they might enter upon and perform their main undertaking according to the intention in which the contract was signed on both parts.

There *is* an estoppel here, but it is on the Government,

and it affords an answer to the one argument made by counsel for the Government on this branch of the case (Brief, page 14). The Government now says to claimants in effect: "When, in February, 1898, you signed a contract with my agent you were already admonished that some uncommon forehandedness would be necessary, because the whole work was to be done in one short season. As regards some little work which, by the specifications, was to be done in sixty days, you, after my agents had wasted some little time, *were* forehanded. Therefore (1) you were bound in law to be more forehanded still in providing for the large and expensive mass of materials which would be required for completion of the much larger work; this, in the hope of completing that work in the time fixed by your contract. But (2) my agents had acted so badly from the first that you might have inferred that, by one means or another, they were going to prevent completion of the whole work in the time stipulated; so, if your notice to proceed had been received a little late only, you probably would not have made this provision for your materials."

It would indeed be a shocking state of the law if such a defense as this were admissible.

We submit that the judgment of the Court of Claims as regards the $4,125 awarded to claimants should be affirmed and that claimant should have judgment also for the amount, found by the Court of Claims, to which, through the Government's dereliction, they suffered with respect to the cost of materials purchased and labor employed.

Respectfully submitted.

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